NO. 82-1788

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

ALABAMA POWER COMPANY,

Petitioner,

v.

NUCLEAR REGULATORY COMMISSION
and THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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The Briefs in opposition of the United States Department of Justice and Staff of the Nuclear Regulatory Commission ("Government"), intervenor Alabama Electric Cooperative ("AEC"), and intervenor Municipal Electric Utility Association of Alabama ("MEUA"), urge this Court to deny the Petition for Certiorari ("Pet.") of Alabama Power Company ("APCO") for essentially two reasons. First, these Briefs assert that the Eleventh Circuit's repeated pronouncements that Section 105c does not "call for or allow a traditional antitrust analysis" are merely "innocuous" remarks,[1] and did not deprive APCO of its right to prove antitrust defenses.[2] Second, "even

[1]Govt. Br. at 7, 9; AEC Br. at 6.
[2]*See* Pet., Pt. II.

if the Court of Appeals had committed the error petitioner alleges," certiorari must still be denied because "its ruling would have no significance beyond this case."[3] Because each of these arguments is based upon serious misstatements of the record and opinions below, APCO is compelled to respond. In addition, the Government has attempted unfairly to narrow the public and industry-wide significance of NRC-mandated joint ownership of electric facilities.

I.

APCO HAS BEEN DEPRIVED OF AN OPPORTUNITY TO PROVE ITS ANTITRUST DEFENSES

By no fair reading of the Eleventh Circuit opinion can the Government contend that "there is no connection between [APCO's] defense[s] and the court of appeals' remarks about traditional antitrust analysis," Govt. Brief at 9. The Eleventh Circuit's entire liability discussion focused on why it believed that judicial and FTC antitrust precedent should not apply under Section 105c. On four occasions, the Eleventh Circuit justified its refusal to consider the antitrust precedents urged upon it by APCO on the ground that a traditional antitrust analysis is neither called for nor allowed under Section 105c. For example, the court said:

> Alabama Power also argues that the NRC has "misapplied settled antitrust principles" in holding nuclear power license applicants to standards "inconsistent with the body of interpretation developed by the courts." They argue that in finding anticompetitive conduct on the part of Alabama Power the NRC has not used standard antitrust analysis developed in the judicial interpretation of the antitrust statutes. . . . We do not believe that the statute calls for or allows traditional antitrust analysis.

Alabama Power Co. v. NRC, 692 F.2d 1362, 1368 (11th Cir.

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[3]Govt. Br. at 7.

[4]In three other places in its opinion the court reiterated the same view. *See* 692 F.2d at 1368 [A10-11] (The command of reasonable probability "may result in the conditioning of licenses in anticipation of situations

1982) [A9-10].[4] Thus, the Government contention that the decision below "contains no indication" that the court's summary affirmance was based on anything other than the antitrust principles applied by NRC is simply a misstatement of what is obvious from the face of the opinion itself.[5]

The Government has also argued that the court's rejection of "traditional antitrust analysis" is a mere restatement of the fact that Section 105c condemns activities which are not yet actual violations of the antitrust laws. *See* Govt. Brief at 8-9. But the court took a different view. The opinion flatly states that Section 105c forbids traditional antitrust analysis and allows the court to condemn anticipated situations which, if left to develop, would not violate the antitrust laws. *See* n. 4, *supra* at 2. Indeed Section 105c is designed to anticipate; it is predictive in the manner of Section 7 of the Clayton Act, a traditional antitrust statute.[6] Section 105c, however, requires NRC and the courts to be guided in making their predictions by the princi-

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which would not, if left to fruition, in fact violate any antitrust law"); *id.* ("Here again, a traditional antitrust enforcement scheme is not envisioned, a wider one is put in place."); *id.* at 1369 [A11-12] ("[settled antitrust principles] simply do not apply in the usual way to nuclear power regulation").

[5]The Government's interpretation of the lower court opinion as a summary affirmance of NRC's antitrust analysis is implausible for another reason. The court did not even discuss its own precedent for APCO's regulatory antitrust defense. Nor did the court give any consideration to NRC's misinterpretation of the Ninth Circuit's opinion on the same subject. *See, e.g., Mid-Texas Communications Systems, Inc. v. AT&T,* 615 F.2d 1372, 1385-90 (5th Cir.), *cert. denied sub nom., Woodlands Telecommunications Corp. v. Southwestern Bell Telephone Co.,* 449 U.S. 912 (1980). Fifth Circuit decisions rendered prior to October 1981 are deemed binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981). *Compare* 13 NRC at 1041 [A28] (citing, *IT&T Corp. v. General Telephone & Electronics Corp.,* 518 F.2d 913, 935-36 (9th Cir. 1975)), *with Phontele, Inc. v. AT&T,* 664 F.2d 716 (9th Cir. 1981), discussed *in* APCO's Reply Brief to Eleventh Circuit at 28-30.

[6]APCO conceded as much in its original filing in this Court. Pet. at 15 n.15. The Government acknowledges this fact yet refuses to respond to APCO's argument that the predictive mandate of Section 105c in no way relieves NRC of its obligation to evaluate past conduct of a nuclear license applicant according to traditional antitrust principles. *Compare* Govt. Brief at 8 *with* Pet. at 15 n.15.

ples recognized in antitrust precedent, including those principles on which APCO's defenses are based. In that crucial regard, the court was mistaken and the Government's argument simply misses the point that the court was making.[7]

Further, even if the Government were correct that the Eleventh Circuit merely "summarily affirmed" NRC, review by this Court would be necessary because a conflict would then exist in the circuits. Unlike every other circuit to consider the issue, NRC and the Eleventh Circuit refuse to allow, as an antitrust defense, a demonstration that regulation can affect market structure and explain the intentions of competitors. This has always been APCO's position and there is widespread judicial agreement with it.[8]

Indeed, the Government contends that NRC's position on the regulatory defense is the same as APCO's. Govt. Brief at 9-10. However, NRC held that its inquiry regarding regulation went no further than the question of implied immunity:

> We fail to perceive how a regulatory scheme that admittedly grants no immunity from the antitrust laws, by its mere existence, alters the character of what is otherwise monopoly power. [APCO's] argument is an attempt to slip in via the back door a proposition the courts have barred at the front, namely, that regulation for other purposes can attenuate the antitrust laws. That argument has been rejected. The best that can be said for it is that the

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[7]The difference between the court's opinion and the Government's position is evidenced by the fact that the court did not rely on a single antitrust precedent in analyzing APCO's market position or behavior, while the Government cites at least ten antitrust cases, including traditional ones like *Brown Shoe Co. v. United States,* 370 U.S. 294 (1962) and *Standard Oil Co. v. United States,* 337 U.S. 293 (1949), in support of the court.

[8]*See, e.g., Phontele, Inc. v. AT&T,* 664 F.2d 716, 737-43 (9th Cir. 1981), *cert. denied,* 103 S.Ct. 785 (1982); *MCI Communications Corp. v. AT&T,* 708 F.2d 1081 (7th Cir. 1983); *Almeda Mall, Inc. v. Houston Lighting & Power Co.,* 615 F.2d 343 (5th Cir. 1980); *City of Groton v. Connecticut Light & Power Co.,* 662 F.2d 921, 931-32 (2d Cir. 1981). The Eleventh Circuit is also in conflict with the principles articulated in two opinions of this Court: *United States v. Marine Bancorporation, Inc.,* 418 U.S. 602, 627 (1974); *Silver v. New York Stock Exchange,* 373 U.S. 341, 360-61 (1963).

> "impact of regulation must be assessed simply as another fact of market life."

13 NRC at 1041 (citations omitted) [A28]; *see also* Pet. at 17 (*quoting* 5 NRC at 885 [A177]). Yet APCO contends that regulation is relevant beyond the question of implied immunity and that NRC was required to consider its impact on APCO's alleged power and intent in the marketplace.[9] NRC's error goes to the heart of this case, rejecting any suggestion that regulation can affect APCO's ability to control prices or exclude competition in central and southern Alabama. Similarly, in every aspect of APCO's electric utility business, ranging from transmission line access to wholesale power sales and the interconnections needed for coordinated operations, NRC ignored regulatory concerns that colored APCO's conduct. *See* Pet. at 15-19. The Eleventh Circuit's alleged summary affirmance puts it and NRC in conflict with the relevant law on the relationship between regulation and antitrust.

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[9]The Government has mischaracterized the example best demonstrating NRC's error, as simply a question of APCO's "accuracy". *See* Govt. Brief at 9. But the record passages cited, concerning APCO's wholesale rate reductions, 13 NRC at 1080-81 [A67-68], reveal that "accuracy" was not in issue. There, NRC reveals that it misunderstands the legal significance of regulation by holding that, notwithstanding APCO's conceded motivation in responding to very real regulatory concerns, APCO's lowering of its wholesale rates was anticompetitive:

> [O]wing to the applicant's monopoly position, AEC had no practical alternative to accepting the reduced rate and dropping its plans for expansion. . . . [A] refusal of the applicant's offer would have brought down upon it the objections of the REA and others who might point out that the insistence on going ahead appeared to involve an unnecessary duplication of effort.
>
> . . . .
>
> [W]e do not believe an ostensible desire on the part of a monopolist to avoid "wasteful duplication" constitutes a legitimate defense under the antitrust laws to charges that the monopolist has prevented prospective competitors from entering a market. The argument that it does is merely another version of the regulated industry defense we addressed earlier. . . .

13 NRC at 1080-81 (*citing id.* at 1039-42 [A28]) [A67-68].

II.

THE ERROR IS OF EXCEPTIONAL IMPORTANCE

The Government also argues that "even if the court of appeals had committed the error petitioner alleges, its ruling would have no significance beyond this case." Govt. Brief at 7. It contends that "the Court of Appeals decision will not have any significant impact on the nuclear industry" because there are no pending antitrust proceedings before NRC. *Id.* at 6. But the government misleads this Court in relying on an outdated 1980 NRC report and by suggesting that Section 105c review is a one-time occurrence whose application has all but ended.[10] NRC's 1981 Annual Report, published in June 1982,[11] indicates that 15 nuclear plants are under review to determine whether a section 105c hearing is needed in connection with the issuance of operating licenses. 1981 *NRC Ann. Rep.* at 48-49 (1982).[12] Moreover, an antitrust hearing is currently being conducted for Pacific Gas & Electric Co. as part of its request to construct the Stanislaus 1 Nuclear Unit. *Id.* at 49.

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[10]Contrary to the Government's assertion, Govt. Brief at 6, the number of previous license applications submitted to NRC for Section 105c review, and the volume of electric energy sales they represent, give no indication of NRC's ability to affect utilities that will be considering the nuclear option in the future. The development of nuclear power remains national policy, and it must be assumed that, but for the Eleventh Circuit opinion, utilities will continue to view nuclear power as a viable option, and seek nuclear power plant licenses.

[11]The 1982 Annual Report is not yet available.

[12]Section 105c empowers the Commission to conduct an antitrust review at the operating stage if significant changes have occurred since the issuance of the construction permit. Moreover, antitrust review is required whenever a licensee seeks to transfer any part of the ownership of a licensed facility or the control of a license or when an amendment to a license is sought or any combination thereof that might result in a substantially different facility. *See Houston Lighting & Power Co.*, CLI-77-13, 5 NRC 1303, 1318 (1977).

In this very proceeding, Section 105c review of APCO occurred at the time that APCO was seeking its operating license, and even delayed issuance of the license. Footnote 6 in the Government's Brief, alleging the absence of NRC antitrust review at the operating state, is misleading. *See also, Houston Lighting & Power Co.*, CLI-78-5, 7 NRC 397 (1978) (convening antitrust hearing at operating license stage).

Only this term this Court agreed to hear three cases construing or affecting NRC's administration of the Atomic Energy Act.[13] Like the State-imposed moratorium on nuclear plant construction in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission,* 51 U.S.L.W. 4449 (U.S. Apr. 20, 1983), and contrary to the Government's assertion, NRC's antitrust powers are demanding review apart from their immediate economic impact. *See, also, Arkansas Electric Coop. v. Arkansas Public Service Commission,* 51 U.S.L.W. 4539 (U.S. May 16, 1983). In *Pacific,* this Court saw no obstacle to review in an argument similar to that of APCO's opponents:

> [p]ostponement of decision would likely work substantial hardship on the utilities. As the Court of Appeals cogently reasoned, for the utilities to proceed in hopes that, when the time for certification came, either the required findings would be made or the law would be struck down, requires the expenditure of millions of dollars over a number of years, without any certainty of recovery if certification is denied. The construction of new nuclear facilities requires considerable advance planning — on the order of 12 to 14 years. . . . To require the industry to proceed without knowing whether the moratorium is valid would impose a palpable and considerable hardship on the utilities, and may ultimately work harm on the citizens of California. Moreover, if petitioners are correct that [the moratorium statute] is void because it hinders the commercial development of atomic energy, "delayed resolution would frustrate one of the key purposes of the [Atomic Energy] Act."

51 U.S.L.W. at 4452. Similarly, immediate economic impact is not the sole standard for undertaking review in this case.

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[13]*See Metropolitan Edison Co. v. People Against Nuclear Energy,* 51 U.S.L.W. 4371 (U.S. Apr. 19, 1983) (The restart of the TMI nuclear plant need not consider psychological stress); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n.,* 51 U.S.L.W. 4449 (U.S. Apr. 20, 1983) (State's right to delay nuclear plant construction); *NRC v. Sholly,* 651 F.2d 780 (D.C. Cir. 1980), *cert. granted* 451 U.S. 1016 (1981), *vacated as moot,* 51 U.S.L.W. 3610 (U.S. Feb. 22, 1983) (convening of hearing as condition to TMI license amendment).

III.
MANDATORY JOINT OWNERSHIP IS A STANDARD NRC NUCLEAR LICENSE CONDITION IN NEED OF REVIEW ON ACCOUNT OF ITS EXTREME NATURE

The Government's current position regarding the remedy imposed in this proceeding is in stark contrast to its position at the hearing. Below, it argued for license conditions "very similar" to those imposed in other proceedings, and they included mandatory joint ownership. *See* Tr. 27169. Now the Government argues that mandatory joint ownership is not "a standard condition," *see* Govt. Brief at 7, but instead a requirement peculiar to the facts of this case.

Both fully litigated antitrust proceeding at NRC[14] have resulted in joint ownership. When utilities have not litigated their liability under Section 105c, the outcome was the same. The overall effect of Section 105c is a "blackmailing" of nuclear license applicants. As the License Board acknowledged, Section 105c could be used, and it has become known in the electric industry, as a device to force nuclear license applicants to accept conditions on their licenses in order to avoid the delays necessitated by refusal. *See* Tr. 5366-67; *accord,* Transcomm, Inc., *The Nuclear Regulatory Commission's Antitrust Review Process: An Analysis of the Impacts* at 12-13 (Draft, June 1981), DOE Contract No. DE-AC01-79PE-70025 ("forces concessions without a full debate on the merits of antitrust issues").

Even if only APCO's position were considered, certiorari would be appropriate. Mandatory rather than voluntary joint ownership of a nuclear plant is extreme, and the uncontroverted findings of the Licensing Board reflect severe doubts about the viability of such an arrangement, especially in view of the history of antagonism between the parties to this action. *See Alabama Power Co.,* LBP-77-27, 5 NRC 804, 960-61 (1977) [A252-53].[15]

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[14]*Consumers Power Co.,* ALAB-452, 6 NRC 892 (1977); *Toledo Edison Co.,* ALAB-560, 10 NRC 265 (1979).

[15]APCO's Vice President for Nuclear Generation, R. P. McDonald, commented in APCO's Petition for Stay in this Court about some of those problems:

The Government's defense of the NRC license conditions ultimately hinges on the alleged absence of any rule proscribing them, particularly NRC's attempt to employ federal subsidies in furtherance of joint ownership. Govt. Brief at 11-12, n.8. But even NRC admits: "This is not to suggest, however, that, the Commission's authority to impose 'appropriate' license conditions is *carte blanche*. The authority to act may not be divorced from the purposes of the legislation." 13 NRC at 1099 [A86].[16] NRC's attempt to increase government subsidies for a rural electric cooperative seeks to protect a competitor at the expense of the competitive process, and is thereby divorced from the purposes of Section 105c.[17]

> Unity and an effective system of control over decision-making are necessary to insure safe operations. Sole control satisfies these needs by establishing a well-defined operational structure and enhanced decision-making capability. The sharing of any operational control may increase the risk to the public safety by complicating and delaying the decision-making process. It may result in a loss of managerial flexibility. My concerns extend beyond mere day-to-day operations to such longer term decisions as the need for capital improvements to insure public safety in operations. Delay in such matters could affect plant safety as well as public safety.

McDonald Affidavit at 2 (March 22, 1983).

[16]Indeed, any other view would create a potentially unconstitutional delegation of legislative licensing authority. *See Industrial Union v. American Petroleum Institute,* 448 U.S. 607, 646 (1980).

[17]The disparaging reference of AEC and the Government to a "4-7%" interest in the Farley Plant, which AEC will acquire, hides the fact that such an acquisition will likely require upwards of $150,000,000 of subsidized REA capital or loan guaranties. APCO does not suggest that an agency rule providing financing advantages to *encourage* explicit Congressional policy is improper as this Court held in yet another energy related case this term, *American Paper Institute, Inc. v. American Electric Power Service Corp.,* 51 U.S.L.W. 4547 (U.S. May 16, 1983). Unquestionably, REA can extend loans or guaranties "in order to bring electric power to parts of the country not adequately serviced by commercial utility companies." *Arkansas Electric, supra,* 51 U.S.L.W. at 4541. The very different question presented here, however, is whether NRC and the Court below erred in ordering joint ownership as an antitrust remedy for the express purpose of extending REA loans and guaranties into a competitive market where Congress has specifically stated that these financing advantages are not to be used for competitive purposes.

Finally, the Government elsewhere has contended that subsidies for rural electrification should be reduced, especially in light of the country's fiscal situation. *See* The Budget of the United States Government, Fiscal 1983 - Appendix at 200-02 (1982). It has urged Congress that rural electrification programs have achieved their original purposes and are no longer needed. Further federally subsidized borrowing will increase demand for money and put artificial upward pressure on interest rates. In this case, there is no need for government subsidies of any kind to assist electric power development. The Farley Plant is completed and operating with APCO as the sole owner and financier. The unnecessary and unwarranted extension of these subsidies should not be allowed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby acknowledge that I have served three copies of the foregoing Reply Brief of Petitioners by first class postage prepaid on the following counsel to the parties of record, this 15th day of August, 1983:

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